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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-814

MID-CONTINENT SPRING
COMPANY OF KENTUCKY, *Petitioner*

v.

MRS. JANE MITCHELL, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

MID-CONTINENT SPRING
COMPANY OF KENTUCKY, *Petitioner*

v.

MRS. JANE MITCHELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit vacating and remanding a dismissal granted by the United States District Court for the Western District of Kentucky and an order denying a petition for rehearing.

OPINIONS BELOW

The opinions in the Court of Appeals (Appendix A, *infra* pp. A-1) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1972. A petition for rehearing was denied on

September 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether compliance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b) providing, in part that "/N/o charge may be filed . . . [with the Equal Employment Opportunity Commission] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or Local law, unless such proceedings have been earlier terminated, . . .", is a jurisdictional prerequisite to action by a United States District Court in those states which provide adequate remedies at the State level.

2. If the first question is answered in the negative, whether the United States Court of Appeals for the Sixth Circuit erred in enlarging the holdings in *Crosslin v. Mountain State Telephone and Telegraph Co.*, 400 U.S. 1004 (1971) by remanding the case to the District Court with specific instructions "to retain jurisdiction for a period of time sufficient to allow Mrs. Mitchell or EEOC to seek redress under the procedures authorized by the statutes of Kentucky", rather than "for reconsideration in light of the suggestions contained in the brief of the Solicitor General, as *amicus curias*, filed November 19, 1970."[1]

STATUTES INVOKED

The provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, KRS 337.420 *et seq.*, are set forth in Appendix B, *infra*, pp. B - 7.

---

[1] The Court made clear that its remand "intimates no view as to the merits of the Solicitor General's position." *Id.*

STATEMENT

Mrs. Mitchell was employed by Mid-Continent Spring Company from August, 1962, until her discharge in August, 1969. In July, 1969, Mrs. Mitchell complained to the Equal Employment Opportunity Commission (hereinafter EEOC) of unequal wages paid to female employees. On August 11, 1969, she filed a sex discrimination charge with EEOC and was discharged the same day. EEOC notified her on March 13, 1971, of her right to sue under 42 U.S.C. 2000(e). This suit was filed in the District Court for the Western District of Kentucky on April 12, 1971.

Mrs. Mitchell never filed a charge with the Kentucky Human Rights Commission or the State Commissioner of Labor, and EEOC never referred the matter to any agency of the Commonwealth.

Petitioner was granted a summary judgment because of respondent's failure to first exhaust available State remedies in accordance with 42 U.S.C. 2000e-5(b). Respondent lodged an appeal to the Court of Appeals for the Sixth Circuit contending that failure to exhaust State remedies did not preclude recovery pursuant to 42 U.S.C. 2000e-5. The Court of Appeals vacated judgment and remanded with instructions to the District Court "to retain jurisdiction for a period sufficient to allow Mrs. Mitchell or EEOC to seek redress under the procedures authorized by the statutes of Kentucky." Although the Court of Appeals states that it is following the procedure adopted by this Court in *Crosslin v. Mountain State Telephone and Telegraph,* 400 U.S. 1004 (1971), its mandate goes far beyond that of this Court in the *Crosslin* case. In remanding the *Crosslin* case to the District Court, this Court made clear that, although it was ordering the District Court to reconsider its earlier order in light of suggestion contained in the Solicitor General's *amicus curias* brief, it was not expressing any view on the merits of the Solicitor General's position. In the instant case, the Court of Appeals has adopted the suggestion, of the Solicitor General as the law of the case, rather than as matters to be considered, *inter alia,* on remand.

Petitioner was denied a rehearing on September 6, 1972, and comes before this Court seeking reversal of the Sixth Circuit's judgment for the reasons stated in the Memorandum and Order from the District Court for the Western District of Kentucky. (Appendix C, *infra*)

REASON FOR GRANTING THE WRIT

I

42 U.S.C. 2000e-5(b) concerns itself with State and Local laws prohibiting the unlawful employment practice alleged and, provides that when such State or Local government provides the machinery to grant or seek relief, or provides criminal proceedings for such unlawful practices, "/N/o charge may be filed . . . [with the Commission] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or Local law, unless such proceedings have been earlier terminated, . . .".

The Senate proponents of the amendment characterized this intention: "/W/ith respect to the enforcement of the title, we undertook to keep *primary, exclusive jurisdiction* in the hands of the *State* Commissions for a sufficient period of time to let them work out their own problems at the Local level." 110 Cong. Rec. 13087 (1964). (emphasis added)

Kentucky has procedures such as are contemplated by Section 2000e-5(b). See KRS 337.420 *et seq.* Sex discrimination is prohibited in the area of wages. KRS 337.423(1). Discharge or discrimination in aiding the enforcement of KRS 337.420 *et seq.*, is likewise prohibited. KRS 337.423(4). The Commissioner, as the chief enforcement officer, has the right of entry and inspection of payroll and employment records to compare character of work and operations and to question in reasonable pursuit of settlement. KRS 337.425(1). Power to examine under oath and subpoena with punishment for contempt of Court is provided (KRS 337.425(2) in conjunction with the use of informal methods of conference, conciliation and persuasion (KRS 337.425(3)).

Actual damages are permitted (KRS 337.427(1)), reasonable attorney's fees to be paid by the defendant and such actions may be brought in any Court of competent jurisdiction (KRS 337.427(2)). The Court may order other affirmative action as appropriate to carry out the purposes of KRS 337.420 to 337.433. KRS 337.427(5).

"The Congressional policy here sought to be enforced is one of eliminating employment discrimination and the statutory enforcement contemplates a resort to the federal remedy *if* the State machinery proves inadequate . . . The system of remedies is a complementary one, with federal remedy designed to be available after the State remedy has been tried without producing speedy results." (Emphasis added) *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 893, 894 (2nd Cir. 1971), *cert. denied*, _____ U.S. _____, 32 L. Ed. 2d 117 (1972).

In an action against an employer based upon racial discrimination, the United States District Court for the Eastern District of Missouri stated: "The statutory provision requiring that the aggrieved party first file a charge with the State agency and wait 60 days or until local proceedings have terminated before filing a charge with the EEOC is a *jurisdictional prerequisite* to this action." (Emphasis added.) *Payne v. Ford Motor Co.*, 334 F. Supp. 172 (E.D. Mo. 1972).

The Sixth Circuit, in its opinion in the instant case, found it significant that ". . . /I/n former EEOC cases in this Court originating in Kentucky, EEOC has referred charges to the State authorities before proceeding in the United States District Court. *See* e.g., *Anderson v. Methodist Evangelical Hospital*, _____F.2d _____ (6th Cir. 1972, No. 71-1671); *Cooper v. Phillip Morris, Inc.*, _____F.2d _____ (6th Cir. 1972, No. 71-2026)." *Bailey v. American Tobacco Co.*, _____F.2d _____ (6th Cir. 1972, No. 71-1902)." It is also worthy of note that Kentucky is not numbered among the seven States which EEOC has classified as lacking "adequate remedial powers."

The legislative history of Section 2000e-5(b), which has been treated above, make crystal clear that the Congress did not intend to create a system which would parallel and compete with existing State systems and thus permit complainants to invoke the Federal statute without first having sought relief under State statutes.

II

If the Court does not agree that the failure to first exhaust adequate State remedies [redacted] *per se* bars action in the Federal Court system, petitioner respectfully urges that the remand of the District Court must be modified to conform to the language of this Court in the *Crosslin* case *supra*. This Court was careful to make clear that it was not expressing its views on the merits of the Solicitor General's suggestion of remand for the sole purpose of permitting recourse to State agencies. Petitioner is not aware of any subsequent expression of this Court as to the merits of this suggestion. Nonetheless, the Court of Appeals for the Sixth Circuit, while stating that it was following what this Court had done in the *Crosslin* case, *supra*, has by its order adopted the Solicitor General's suggestion. The Court of Appeals has thus expanded and extended *Crosslin*, under the guise of following it, and it has done so without giving any clue as to its rationale. This is clear error on the part of the Court of Appeals.

CONCLUSION

The Court of Appeals erred in reversing the District Court's summary judgment. Commencement of a State proceeding coupled with the filing of a charge to EEOC is clearly a jurisdictional prerequisite under Section 2000e-5. Granting jurisdiction to the District Court in these circumstances clearly thwarts the intent of Congress not to supersede existing workable State and Local mechanisms. Petitioner has been prejudiced because it has been forced to defend a Federal civil

action because the respondent and the EEOC for reasons not stated,[2] chose to by-pass less formal State procedures such as mediation and conciliation.

Petitioner has been forced into a twenty-one month stalemate by virtue of the respondent and EEOC not following the provisions of 42 U.S.C. 2000e-5(b).

To remand the case to the District Court for the sole purpose of now permitting respondent to seek redress under Kentucky statutes would deprive petitioner of the right to present to the District Court the various equities, including laches, which argue against adoption of the Solicitor General's suggestion of a limited retention of jurisdiction in this proceeding.

Respectfully submitted,

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[2]In opposition to motion for dismissal, respondent did not offer any proof as to why referral was not made to the appropriate State agency.

APPENDIX

APPENDIX A-1

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 72-1057

JANE MITCHELL, ET AL.,
Plaintiffs-Appellants,

v.

MID-CONTINENT SPRING COMPANY OF KENTUCKY,
Defendant-Appellee.

Appeal from United States District Court for the Western District of Kentucky

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Decided and Filed August 11, 1972

Before Phillips, Chief Judge, and McAllister and O'Sullivan, Senior Circuit Judges.

Phillips, Chief Judge. This is an action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, alleging employment and wage discrimination on account of sex. District Judge Rhodes Bratcher granted summary judgment on the ground that Mrs. Jane Mitchell, the plaintiff, failed to exhaust her available State remedies. We agree with the District Court that referral of the charge to Kentucky authorities was required before initiating this action in the District Court, but vacate the order of dismissal and remand for the reasons stated in this opinion.

APPENDIX A-2

Mrs. Mitchell was employed by Mid-Continent Spring Company from August 1962 until her discharge in August 1969. In July 1969 Mrs. Mitchell complained to EEOC of unequal wages paid to female employees. On August 11, 1969, she filed a sex discrimination charge with EEOC and was discharged the same day. EEOC notified her on March 13, 1971, of her right to sue under 42 U.S.C. § 2000e. This suit was filed in the District Court on April 12, 1971.

Mrs. Mitchell never filed a charge with the Kentucky Human Rights Commission or the State Commissioner of Labor, and EEOC never referred the matter to any agency of the Commonwealth.

As said by the Supreme Court in *Love* v. *Pullman Co.*, 404 U.S. 522, 523 (1972):

> "A person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, may not maintain a suit for redress in federal district court until he has first unsuccessfully pursued certain avenues of potential administrative relief."

One of the required areas of administrative relief is to commence proceedings under State law, when available. 42 U.S.C. § 2000e-5(b) provides as follows:

> "(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first

year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

If the employee first files the charge with EEOC instead of with the State agency, it is a sufficient compliance with the statute for EEOC to refer the matter to the appropriate State agency. *Love* v. *Pullman Co., supra.*

In the present case, it is conceded that Mrs. Mitchell filed no charge with State authorities and that EEOC did not refer the matter to any State agency. EEOC contends that such referral is not necessary, because there is no State agency in Kentucky with adequate power to grant relief. Judge Bratcher held to the contrary saying:

> "KRS 337.423(1) makes it unlawful for an employer to discriminate against employees based on sex 'by paying wages . . . at a rate less than the rate at which he pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility.'
>
> "KRS 337.425 authorizes the Commissioner of Labor to conduct a full investigation involving claims of wage discrimination and to eliminate such unlawful practices by informal methods of conference, emulation and persuasion and to supervise the payment of wages owing an employee.
>
> "KRS 337.427(4) allows the Commissioner, at the employees written request, to institute legal action to collect unpaid wages and KRS 337.427(6) authorizes the Commissioner on his own motion to petition any court of competent jurisdiction to restrain violation of wage discrimination based on sex and to petition for such affirmative relief as the Court deems proper.

"Alternatively, KRS 337.427(2) allows the aggrieved employee to bring suit herself and to recover not only the lost wages but also the attorneys' fees and costs of the action."

Relief available through Kentucky agencies was broadened by the enactment of House Bill 430 by the 1972 General Assembly of the Commonwealth of Kentucky, effective March 24, 1972, amending KRS §§ 344.010, 344.020, 344.040, 344.050, 344.060, 344.070, 344.080, 344.100 344.110, 344.130, 344.200, 344.360 and 344.365.

It is significant that in former EEOC cases in this court originating in Kentucky, EEOC has referred charges to the State authorities before proceeding in the United States District Court. *See, e.g., Anderson* v. *Methodist Evangelical Hospital,* — F.2d — (6th Cir. 1972, No. 71-1671); *Cooper* v. *Philip Morris, Inc.,* — F.2d — (6th Cir. 1972, No. 71-2026); *Bailey* v. *American Tobacco Co.,* — F.2d — (6th Cir. 1972, No. 71-1902).

In *Crosslin* v. *Mountain State Telephone Company,* 422 F.2d 1028 (9th Cir. 1970), the Court of Appeals for the Ninth Circuit held that EEOC was required to refer a charge to the Arizona Civil Rights Commission before seeking relief in a District Court. In that case EEOC contended that Arizona did not have an adequate State statute, just as in the present case it questions the adequacy of the Kentucky statute. The Supreme Court vacated and remanded for reconsideration in light of suggestions contained in the brief of the Solicitor General as amicus curiae. 400 U.S. 1004.[1]

The suggestion made by the Solicitor General was as follows:

---

[1] In the Arizona case the dissenting opinion of Mr. Justice Douglas and the brief of the Solicitor General state that there are only seven states whose agencies have remedial powers which EEOC finds inadequate. Kentucky is not one of the seven enumerated States.

> "The issue of the validity of EEOC's interpretation of Section 706(b) is not, in our view, of sufficient importance to warrant review by this Court at this time. We believe, however, that even if the court of appeals correctly rejected EEOC's interpretation, that court erred in treating the failure to defer to the state agency as a complete bar to judicial relief for the alleged discrimination. We therefore suggest that this Court should grant certiorari for the limited purpose of ordering the case to be remanded to the district court with instructions to retain jurisdiction for a period sufficient to allow petitioner to seek redress through the Arizona Civil Rights Commission."

We follow the procedure in the present case that was adopted by the Supreme Court in *Crosslin*. The judgment of the District Court is vacated and the case is remanded with instructions to retain jurisdiction for a period sufficient to allow Mrs. Mitchell or EEOC to seek redress under the procedures authorized by the statutes of Kentucky.

It is clear that Mrs. Mitchell should not lose her cause of action because of the failure of EEOC to refer her complaint to a State agency. *Love* v. *Pullman Co., supra,* 404 U.S. 522 (1972); *Vigil* v. *American Telephone & Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972).

Vacated and remanded.

§ 2000e–5. Enforcement provisions–Charges by persons aggrieved or member of Commission; copy of charges to respondents; investigation of charges; conference, conciliation, and persuasion for elimination of unlawful practices; prohibited disclosures; use of evidence in subsequent proceedings; penalties

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved,or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State,

which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Same; notification of State or local authority; time for action on charges by Commission

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Time for filing charges after occurence of unlawful practices or termination of State or local enforcement proceedings; filing of charges by Commission with State or local agency

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil actions for prevention of unlawful practices; legal representation; commencement of action without payment of fees, costs, or security; intervention by Attorney General; stay of Federal proceedings

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its

discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

Jurisdiction and venue of United States courts

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Injunction; appropriate affirmative action; reinstatement, hiring, back pay; reduction of back pay by interim earnings or amount earnable; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees,

with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e–3(a) of this title.

Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to compel compliance with judicial orders

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e) of this section, the Commission may commence proceedings to compel compliance with such order.

Appeals

(j) Any civil action brought under subsection (e) of this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub.L. 88–352, Title VII, § 706, July 2, 1964, 78 Stat. 259.

APPENDIX B-7

WAGES AND HOURS

WAGE DISCRIMINATION BECAUSE OF SEX

337.420 Definitions.

(1) "Employe" means any individual employed by any employer, including but not limited to individuals employed by the state or any of its political subdivisions, instrumentalities, or instrumentalities of political subdivisions.

(1966 c 114, § 1. Eff. 6-16-66)

(2) "Employer" means a person who has eight or more employes within the state in each of twenty or more calendar weeks in the current or preceding calendar year and an agent of such a person.

(1966 c 114, § 1. Eff. 6-16-66)

(3) "Wage rate" means all compensation for employment, including payment in kind and amounts paid by employers for employe benefits, as defined by the commissioner in regulations issued under KRS 337.420 to 337.433 and 337.992.

(1966 c 114, § 1. Eff. 6-16-66)

(4) "Employ" includes to suffer or permit to work.

(1966 c 114, § 1. Eff. 6-16-66)

(5) "Occupation" includes any industry, trade, business or branch thereof, or any employment or class of employment.

(1966 c 114, § 1. Eff. 6-16-66)

(6) "Commissioner" means the Commissioner of Labor.

(1966 c 114, § 1. Eff. 6-16-66)

(7) "Person" includes one or more individuals, partnerships, corporations, legal representatives, trustees, trustees in bankruptcy, or voluntary associations. (1966 c 114, § 1. Eff. 6-16-66)

APPENDIX B-8

LABOR

337.423 Prohibition of discrimination.

(1) No employer shall discriminate between employees in the same establishment on the basis of sex, by paying wages to any employ in any occupation in this state at a rate less than the rate at which he pays any employe of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility. Differentials which are paid pursuant to established seniority systems or merit increase systems, which do not discriminate on the basis of sex, are not within this prohibition provided, however, that nothing in KRS 337.420 to 337.433 and 337.992 shall apply to any employer who is subject to the Federal Fair Labor Standards Act of 1938, as amended, when that act imposes comparable or greater requirements than contained in KRS 337.420 to 337.433 and 337.992 and when said employer files with the Commissioner of the Department of Labor a statement that said employer is covered by the Federal Fair Labor Standards Act of 1938, as amended.

(1966 c 114, § 2. Eff. 6-16-66)

(2) An employer who is paying wage differential in violation of KRS 337.420 to 337.433 and 337.992 shall not, in order to comply with it, reduce the wage rates of any employe.

(1966 c 114, § 2. Eff. 6-16-66)

(3) No person shall cause or attempt to cause an employer to discriminate against any employe in violation of KRS 337.420 to 337.433 and 337.992.

(1966 c 114, § 2. Eff. 6-16-66)

(4) No employer may discharge or discriminate against any employe by reason of any action taken by such employe to invoke or assist in any manner the enforcement of KRS

337.420 to 337.433 and 337.992. (1966 c 114, § 2. Eff. 6-16-66)
Penalty, 337.992

337.425 Powers of commissioner.

(1) For this purpose, the commissioner, or his authorized representative, shall have power to enter the place of employment of any employer to inspect and copy payrolls and other employment records, to compare character of work and operations on which persons employed by him are engaged, to question such persons, and to obtain such other information as is reasonably necessary to the administration and enforcement of KRS 337.420 to 337.433 and 337.992.

(1966 c 114, § 3. Eff. 6-16-66)

(2) The commissioner or his authorized representative shall have power to examine witnesses under oath, and to require by subpoena the attendance and testimony of witnesses and the production of any documentary evidence relating to the subject matter of any investigation undertaken pursuant to KRS 337.420 to 337.433 and 337.992. In the event of the failure of a person to attend, testify or produce documents under or in response to a subpoena, the circuit court in the judicial district wherein the hearing is being held, on application of the commissioner or his representative, may issue an order requiring said person to appear before the commissioner or his authorized representative, or to produce documentary evidence, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

(1966 c 114, § 3. Eff. 6-16-66)

(3) The commissioner is authorized to endeavor to eliminate pay practices unlawful under KRS 337.420 to 337.433 and 337.992 by informal methods of conference, conciliation and persuasion, and to supervise the payment of wages owing to any employe under KRS 337.420 to 337.433 and 337.992.

(1966 c 114, § 3. Eff. 6-16-66)

(4) The commissioner shall have power to issue such regulations not inconsistent with the purpose of KRS 337.420 to 337.433 and 337.992, as he deems necessary or appropriate to carry out its provisions. (1966 c 114, § 3. Eff. 6-16-66)

Penalty, 337.992

337.427 Collection of unpaid wages and other relief.

(1) Any employer who violates the provisions of KRS 337.423 shall be liable to the employe or employes affected in the amount of their unpaid wages, and in instances of willful violation in employe suits under subsection (2) of this section, up to an additional equal amount as liquidated damages.

(1966 c 114, § 4. Eff. 6-16-66)

(2) Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employes for and in behalf of himself or themselves and other employes similarly situated. The court in such action shall, in cases of violation in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

(1966 c 114, § 4. Eff. 6-16-66)

(3) No agreement by any such employe to work for less than the wage to which such employe is entitled under KRS 337.420 to 337.433 and 337.992 shall be a bar to any such

action, or to a voluntary wage restitution of the full amount due under KRS 337.420 to 337.433 and 337.992.

(1966 c 114, § 4. Eff. 6-16-66)

(4) At the written request of any employe claiming to have been paid less than the wage to which he may be entitled under KRS 337.420 to 337.433 and 337.922, the commissioner may bring any legal action necessary in behalf of the employe to collect such claim for unpaid wages. The commissioner shall not be required to pay the filing fee, or other costs, in connection with such action. The commissioner shall have power to join various claims against the employer in one cause of action.

(1966 c 114, § 4. Eff. 6-16-66)

(5) In proceedings under this section, the court may order other affirmative action as appropriate, including reinstatement of employes discharged in violation of KRS 337.420 to 337.433 and 337.992.

(1966 c 114, § 4. Eff. 6-16-66)

(6) The commissioner shall on his own motion have power to petition any court of competent jurisdiction to restrain violations of KRS 337.423, and to petition for such affirmative relief as the court may deem appropriate, including restoration of unpaid wages and reinstatement of employes, consistent with the purpose of KRS 337.420 to 337.433 and 337.992. (1966 c 114, § 4. Eff. 6-16-66)

Penalty, 337.992

337.430 Statute of limitations.

Court action under KRS 337.420 to 337.433 and 337.992 may be commenced no later than six months after the cause of action occurs. (1966 c 114, § 5. Eff. 6-16-66)

APPENDIX B-12

WAGES AND HOURS

337.433 Posting of law.

Every person subject to KRS 337.420 to 37.433 and 337.992 shall keep an abstract or copy of KRS 337.420 to 337.433 and 337.992 posted in a conspicuous place in or about the premises wherein any employe is employed. Employers shall be furnished copies or abstracts of KRS 337.420 to 337.433 and 337.992 by the state on request without charge. (1966 c 144, § 7. Eff. 6-16-66)

APPENDIX C

No. 72-1057

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MRS. JANE MITCHELL,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Order Denying Petition
	)	For Rehearing
	)	
MID-CONTINENT SPRING COMPANY OF KENTUCKY,	)	
	)	
Defendant-Appellee.	)	

Before PHILLIPS, Chief Judge, and McALLISTER and O'SULLIVAN, Senior Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court. Sept 6, 1972

/s/ James A. Higgins

CLERK

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-814

MID-CONTINENT SPRING
COMPANY OF KENTUCKY, Petitioner

v.

MRS. JANE MITCHELL, Respondent

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

MID-CONTINENT SPRING
COMPANY OF KENTUCKY, Petitioner

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MRS. JANE MITCHELL

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT

Petitioner's statements related to the facts are accepted; however, that part of petitioner's "statement" dealing with the interpretation of Crosslin v. Mountain State Telephone and Telegraph, 400 U.S. 1004 (1971) is not accepted as will be discussed under Argument II.

ARGUMENTS

I

INITIAL REFERRAL TO A STATE AGENCY WITH LIMITED AND SPECIAL JURISDICTION IS NOT REQUIRED UNDER SECTION 706(B) OF TITLE VII, CIVIL RIGHTS ACT OF 1964, 42 USC § 2000-e-5; BUT ASSUMING ARGUENDO THAT SUCH REFERRAL IS REQUIRED, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S FAILURE TO DO SO WOULD ONLY CONSTITUTE A PROCEDURAL DEFECT, CURABLE ON REMAND.

The legislative history pertinent to the enactment of Title VII indicates that the overriding objective of this legislation was the elimination of invidious employment discrimanation. Tipler v. E. I. du

Pont de Nemours & Company, 443 F 2d 125 (C.A. 6, 1971). As a procedural method to attain this objective, Congress established a 60-day period of exclusive state jurisdiction prior to federal involvement in those instances where state law authorized relief from the invidious employment and discrimination by means of state agencies with general jurisdiction to deal with the full range of discriminatory employment practices. It should be emphasized that by virtue of the legislative history surrounding the enactment of Title VII it is obvious that it was the intent of Congress that referral be made by the EEOC or other federal agency only when the state involved has an agency with general jurisdiction empowered to resolve with full range of discriminatory employment practices alleged in the complaint.

While Kentucky has a Fair Employment Practices Commission with general jurisdiction to deal with the full range of discriminatory employment practices related to race, color, religion, and national origin, it has failed to extend this same protection on the basis of sex. Under Kentucky law, neither the Kentucky

Fair Employment Practices Commission or any other state agency is empowered to grant relief similar or identical to the remedies intended by the United States Congress. Because the state remedy is insufficient, the only remedy available to respondent, Jane Mitchell, is that afforded under federal law. The respondent has followed the appropriate and the only procedural remedies. The relief provided by the Kentucky Equal Pay Act is an insufficient basis upon which to cut off the assertion of federal rights.

Finally, even assuming arguendo, that prior resort to the state authorities administering the "Kentucky Equal Pay Act" was required under section 706(B) as to the equal pay fraction of Respondent Mitchell's claim, that defect is curable upon remand by providing the Kentucky authorities an opportunity to consider this portion of Respondent Mitchell's claim for the required period of time. Crosslin, supra. In Crosslin, this Court remanded to the court in Arizona with instructions to consider the Solicitor's General suggestion.

The whole thrust of the Solicitor General's brief which this Court suggested be considered was based upon the theory that Ms. Crosslin's right to relief should not be destroyed by a judicial determination, long after the event, that the EEOC's view of deferral under section 706(B) was incorrect. The brief stressed the well-settled principle that Commission action or inaction does not affect federal court jurisdiction. Fekete v. United States Steel Corp., 424 F.2d 331,336 (3rd Cir.1970).

To allow Respondent Mitchell, on remand, to file her charge with the appropriate Kentucky agencies in order to eliminate any question as to federal jurisdiction, clearly comports with this Court's view concerning statutes enacted to vindicate humanitarian policies.[1] Equitable principles dictate that where a plaintiff has attempted to comply with the procedural requirements for maintaining the action under a remedial, humanitarian statute, failure to do so

1. That Title VII is such a statute is beyond dispute. Griggs v. Duke Power Co., 401 U.S. 424,91 S.Ct. 849(1971)

because of a reasonable mistake will not be held to bar her action at least where the defendant has not been prejudiced. Burnett v. New York Central R. R. Co., 380 U.S. 424,85 S.Ct. 1050(1965). A guiding principle in Title VII litigation is that laymen are unschooled in the law and must, therefore, be protected by courts from legal pitfalls. Sanchez v. Standard Brands, Inc., 433 F 2d, 455,462 (5th Cir., 1970).

Petitioner, Mid-Continent Spring Company of Kentucky, is not prejudiced in its defense because of the procedure taken by the respondent gave the petitioner timely notice of Respondent Mitchell's grievance. The decision of the Sixth Circuit Court of Appeals allowing Respondent Mitchell to follow the procedure of going through a state agency comports with concepts of fair play and substantial justice.

II

THE MANDATE OF THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT GO FAR BEYOND THE MANDATE OF THIS COURT IN THE CROSSLIN CASE.

Respondent contends that the Crosslin case remand to the U. S. District Court for the District of Arizona for reconsideration in light of the suggestions contained in the brief of the Solicitor General means that this Court does not desire to make the determination in each and every case of whether or not referral to a state agency is necessary. In Crosslin, the district court was given a choice to follow or not to follow the Solicitor General's suggestion. Upon remand, this Court stated that it should consider the Solicitor General's opinion with the district court having the choice of either following or not following this opinion. In the present case, the Sixth Circuit Court of Appeals made the determination that this Court allowed the district court in Crosslin to make, i.e. retention of jurisdiction in the district court for a period sufficient to allow Mrs. Mitchell or the EEOC to seek redress under the procedures authorized by the statutes of Kentucky. Respondent contends this is not error but a just and equitable decision in an effort to allow Mrs. Mitchell to retain

her claim. The Sixth Circuit Court of Appeal's decision merely comports with the determination by the United States Supreme Court that Mrs. Mitchell should not lose her cause of action because of the failure of the EEOC to refer her complaint to a state agency. Love v. Pullman Co., 404 US 522 (1972).

CONCLUSION

No adequate remedy existed under Kentucky statutes; therefore, the failure to refer respondent's claim to a Kentucky agency was not fatal. The most it could be considered would be a procedural defect which the Sixth Circuit Court of Appeals has cured on remand. The Crosslin case was not misinterpreted or extended by the Sixth Circuit Court of Appeals in the present case. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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